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Nos. 07-984 and 07-990

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In the

Supreme Court of the United States

COEUR ALASKA, INC., *Petitioner*,
v.
SOUTHEAST ALASKA CONSERVATION COUNCIL, et al., *Respondents*.

STATE OF ALASKA., *Petitioner*,
v.
SOUTHEAST ALASKA CONSERVATION COUNCIL, et al., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, ALASKA MINERS ASSOCIATION, AND ALASKA FOREST ASSOCIATION IN SUPPORT OF PETITIONERS

JAMES S. BURLING
Counsel of Record
BRANDON M. MIDDLETON
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amici Curiae Pacific Legal Foundation, Alaska Miners Association, and Alaska Forest Association

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QUESTION PRESENTED

Section 404 of the Clean Water Act authorizes the U.S. Army Corps of Engineers to issue permits for discharges of "fill material" provided that the discharges comply with that section's water-quality requirements jointly developed by the Corps of Engineers and the Environmental Protection Agency. 33 U.S.C. § 1344(a), (b)(1). By regulation, the Corps of Engineers and EPA have jointly defined "fill material" generally as any material that has the net effect of raising the bottom elevation of a water of the United States, including specifically "slurry, or tailings or similar mining-related materials," 33 C.F.R. § 323.2(e)—(f); 40 C.F.R. § 232.2.

In this case, the Ninth Circuit held that the Corps of Engineers lacked authority under Section 404 to issue a permit for the discharge of fill material whenever the discharge implicates an effluent restriction promulgated by EPA as part of its permit program under Section 402 of the Act. On that basis, Ninth Circuit invalidated a Section 404 discharge permit issued by the Corps of Engineers to Petitioner Coeur Alaska, Inc.

The question presented is whether the Ninth Circuit erred in rejecting the expert agencies' conclusion, based on their joint interpretation of the Act, that effluent restrictions promulgated as part of the Section 402 permit program do not apply to discharges of fill material permitted under Section 404.

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF), the Alaska Miners Association, and the Alaska Forest Association submit this amicus curiae brief in support of Petitioners State of Alaska and Coeur Alaska, Inc.[1] The parties have consented to the filing of this amicus curiae brief.[2]

Founded thirty-five years ago, PLF is the largest and most experienced public interest legal foundation of its kind. PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF participated as lead counsel in previous cases, including *Rapanos v. United States*, 547 U.S. 715 (2006), involving the administration of the Clean Water Act. And PLF also participated as amicus or lead counsel in several cases concerning the Takings Clause of the Constitution. *See e.g., Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

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[1] Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

[2] Pursuant to Rule 37.3(a), amici curiae state that letters indicating their intent to file this brief were sent to all counsel of record on August 25, 2008. The consent of the Solicitor General is filed herewith. All other parties have issued blanket consents to the filing of amicus briefs in support of either party or neither party.

The Alaska Miners Association (AMA) is a nonprofit membership organization established in 1939 to represent the mining industry. The AMA is composed of more than 1100 individual prospectors, geologists and engineers, vendors, suction dredge miners, small family mines, junior mining companies, and major mining companies. The AMA's members explore for and produce gold, silver, platinum, diamonds, lead, zinc, copper, coal, limestone, sand and gravel, crushed stone, armor rock, etc. AMA members live and work throughout the State of Alaska, and if the decision of the Ninth Circuit Court of Appeals in *Southeast Alaska Conservation Council v. United States Corps of Engineers* is allowed to stand, it will have extreme adverse impacts on AMA members and their ability to operate.

The Alaska Forest Association (AFA) is a nonprofit industry trade association established in 1957. The AFA's membership includes businesses and individuals in the Alaskan timber industry. The AFA's mission is to advance the restoration, promotion, and maintenance of a healthy, viable forest products industry which contributes to the economic and ecological health of Alaska's forests and communities.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit's decision invalidated the United States Army Corps of Engineers' (Corps) and the United States Environmental Protection Agency's (EPA) interpretation of the Clean Water Act (CWA) that the discharge of fill material into an impoundment falls within the Corps' exclusive permitting authority under Section 404. In place of this longstanding interpretation, the Ninth Circuit erroneously held the

CWA to require that the discharge of fill material must also satisfy effluent limitations and performance standards separately promulgated by the EPA pursuant to Section 402 of the Act. In so holding, the Ninth Circuit not only misinterpreted the distinct statutory programs of Section 404 and Section 402, but it also effectively prohibited one of the most common and environmentally sound methods for the disposal of mining waste. Reversing the Ninth Circuit is necessary to confirm the proper permitting authority for the discharge of fill material and to allow the mining industry to continue operations, to the benefit of the state and national economy.

This case is of vital importance to Alaska's mining industry. Historically, mining has been a cornerstone of the Alaskan economy, and today the industry is delivering a broad range of economic benefits to Alaskans and their local communities. Mining is a significant source of revenue and infrastructure development for state and local governments and Native corporations. The livelihoods of many Alaskans and their families depend on mining. Amici urge the Court to reverse the Ninth Circuit's decision and set forth guidelines that will permit mining operations to continue to impound tailings subject to Section 404 permitting.

ARGUMENT

I

THE SECTION 404 AND SECTION 402 PERMIT PROGRAMS ARE DISTINCT AND OFFER A BIFURCATED STATUTORY SCHEME

The CWA, 33 U.S.C. §§ 1251-1387, establishes two regulatory permitting programs for discharges into navigable waters of the United States. Section 404 of the Act requires a permit for the discharge of dredged or fill material into navigable waters and is administered by the Corps, with cooperation and regulatory assistance from the EPA. 33 U.S.C. § 1344. Section 402, also known as the National Pollutant Discharge Elimination System (NPDES) program, is administered by the EPA and requires a permit for the discharge of all pollutants other than dredged or fill material. 33 U.S.C. § 1342. Under Section 402, the discharge of pollutants is subject to the effluent limitations and performance standards (collectively effluent limitations) prescribed pursuant to Sections 301 and 306 of the Act. 33 U.S.C. § 1311 (Section 301 effluent limitations); 33 U.S.C. § 1316 (Section 306 new source performance standards).

The Section 404 and Section 402 schemes are separate permitting programs, *Rapanos v. United States*, 547 U.S. at 744-45 (plurality opinion), such that discharges into the navigable waters of the United States are to be regulated under either Section 404 or Section 402, but not both. As the Fourth Circuit noted, the 404/402 "fill-effluent distinction" demonstrates that "the Clean Water Act clearly intended to divide

functions between the Corps and the EPA based on the type of discharge involved." *Kentuckians for Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 447 (4th Cir. 2003).

Although the Corps granted Petitioner a permit to discharge wastewater containing tailings into a small lake under Section 404, *see Southeast Alaska Conservation Council v. United States Army Corps of Engineers*, 486 F.3d 638, 640-41 (9th Cir. 2007) (*SEACC*), and the Ninth Circuit admitted that Petitioner Coeur Alaska's froth-flotation mill operation "facially meets the Corps' current regulatory definition of 'fill material' because it would have the effect of raising the bottom elevation of the lake," *id.* at 644, the Ninth Circuit nevertheless invalidated the permit based on effluent limitations promulgated under Sections 301 and 306 of the CWA, holding that "[n]either § 301 nor § 306 contains an exception for discharges that would otherwise qualify for regulation under § 404." *Id.* at 646.

This holding, however, ignores the critical distinction between Sections 404 and 402. While purporting to "maintain [the] existing approach to regulating pollutants under either section 402 or 404 of the CWA," *id.* at 651, the Ninth Circuit instead misread the general prohibition of 33 U.S.C. § 1311(a) (Section 301) to eviscerate the function of Section 404: "The use of 'and' as a connector [in 33 U.S.C. § 1311(a)], instead of 'or,' indicates that Congress intended for effluent limitations and standards of performance to apply to all applicable discharges, even those that facially qualify for permitting under § 404." *Id.* at 646. However, this Court has held that the use of "and" between statutory requirements does not

automatically make such requirements conjunctive. *See, e.g., Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 248-49 (1985) (reversing Court of Appeals' conclusion that the two clauses of Section 17 of the Pueblo Lands Act were both required because they were "joined by the conjunctive 'and'").

Instead of an all-inclusive prohibition, Section 301 contemplates a system whereby pollutant discharges would be generally prohibited "[e]xcept as in compliance" with various provisions of the CWA, including Section 404. 33 U.S.C. § 1311(a). In other words, Section 301 instructs potential dischargers to look to other provisions in order to determine whether the general prohibition of Section 301 is applicable. *See City of Baton Rouge v. United States Envtl. Prot. Agency*, 620 F.2d 478, 479 & n.1 (5th Cir. 1980) (noting that Section 301 "proscribes the discharge of pollutants except in compliance with NPDES permits issued under section [402]" and that Section 301 "*has several other exceptions*," including Section 404) (emphasis added).

The distinct nature of Section 404—in that permits under Section 404 absolve the need for compliance under Sections 301, 402, and the other provisions listed in 301(a)—is confirmed by Section 402's requirement that 402 permits "meet . . . all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343," 33 U.S.C. § 1342(a), a list that is not present in Section 404. Since Section 404 gives the Corps authority to permit "discharge[s] of dredged or fill material into the navigable waters," 33 U.S.C. § 1344, and does not require compliance with the provisions listed in Section 402, discharges permitted under the former provision are exempt from

the general prohibition of Section 301. *See United States v. Riverside Bayview Homes, Inc.*, 729 F.2d 391, 393 (6th Cir. 1984) (noting that Section 301 of the Clean Water Act states that "except as permitted under certain exceptions, 'the discharge of any pollutant by any person shall be unlawful.' . . . One of the express exceptions to this rule is contained in section 404 . . . which authorizes the Corps to issue permits for the disposal of dredged or fill materials into 'navigable waters'" (citations omitted)), *rev'd on other grounds*, 474 U.S. 121 (1985), *and Riverside Bayview Homes, Inc.*, 474 U.S. at 123 (noting that under the Clean Water Act "any discharge of dredged or fill materials into 'navigable waters' . . . is forbidden unless authorized by a permit issued by the Corps of Engineers pursuant to § 404, 33 U.S.C. § 1344"). *See also* Robert J. Pierce, *Technical Principles Related to Establishing the Limits of Jurisdiction for Section 404 of the Clean Water Act* 34 (Apr. 2003), *available at* http://www.wetlandtraining.com/pdfs/tpreljscwa.pdf (last visited Sept. 19, 2008) ("Congress recognized the difference in the nature of discharges of dredged and fill material when it specifically carved-out Section 404 and named the Secretary of the Army to administer it."), *cited in Rapanos*, 547 U.S. at 745 n.11 (plurality opinion). Congress did not impose the requirements that are explicitly stated in Section 402 because:

> In contrast to the pollutants normally covered by the permitting requirement of § 1342(a), "dredged or fill material," which is typically deposited for the sole purpose of staying put, does not normally wash downstream, and thus does not normally constitute an "addition . . . to navigable

> waters" when deposited in upstream isolated wetlands.

Rapanos, 547 U.S. at 744-45 (plurality opinion).

To suggest that "the lack of any explicit exception to § 301 and § 306 within § 404, and the lack of an exception for process wastewater from mines, is strong evidence that Congress did not intend one," *SEACC*, 486 F.3d at 648, is to fail to fully understand the 404/402 "fill-effluent distinction" of the CWA. *See Kentuckians for the Commonwealth*, 317 F.3d at 447. The Fourth Circuit correctly articulated this dichotomy in *Kentuckians for the Commonwealth,* noting that "[f]ill material differs fundamentally from the types of pollutants covered by section 402 because the principal environmental concern is the loss of a portion of the water body itself. For this reason, the section 404 permitting process focuses on different considerations than the section 402 permitting program." *Id* at 446.

While Section 404 provides for certain instances where discharges of dredged or fill material do not require a permit, it does not provide explicit exceptions to the Section 402 permit program, as that would render the 404/402 fill-effluent distinction irrelevant. For example, the list of activities in Section 404(f)(1) is not a list of those activities that are exempt from Section 301 and Section 402 regulations, but instead is only "a short list of exceptions to the broad range of discharges covered by the term 'fill material' in § 404(a)." *Id.* at 442 (analyzing Section 404(f)(1), 33 U.S.C. § 1344(f)(1), which provides that the discharge of dredged or fill material from or for certain activities "is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions

under section 1317)"). *See also Avoyelles Sportsmen's League v. Alexander*, 473 F. Supp. 525, 531 (W.D. La. June 9, 1979) ("[A] permit is not required for all discharges of dredged or fill material. [Section] 404(f)(1) exempts certain activities from the [Section 404] permit program."), *aff'd*, 715 F.2d 897, 925-26 (5th Cir. 1983). *But see SEACC*, 486 F.3d at 648 (suggesting that because "§ 404(f) exempts discharges of dredged or fill material from certain activities from regulation under § 301(a), § 402, and § 404," and because "[m]ining is not listed as an exempt activity [in § 404(f)]," tailings discharges from froth-flotation mills are not exempt from Section 301 and Section 306 effluent limitations).

In short, Sections 404 and 402 offer distinct permitting programs—regulation of discharges under one takes the discharge beyond the scope of regulation under the other.

II

THE TAILINGS RESULTING FROM PETITIONER COEUR ALASKA'S MINING OPERATIONS SHOULD BE REGULATED UNDER SECTION 404 OF THE CLEAN WATER ACT

A. Petitioner Coeur Alaska's Kensington Mining Operations Will Result in a Stationary Tailings Impoundment

Within any gold mine, rock containing valuable gold mineral (ore) is excavated from its in situ location with the use of drills and explosives. The broken ore is delivered outside the mine to a mill where it is crushed and then ground to the consistency of fine sand.

Through the addition of water, this sand combines to make a slurry which is then pumped to separation tanks known as flotation cells. Organic reagents similar to soap are added to the slurry and air is injected into the flotation cells to create bubbles. The reagents are designed such that the specks of gold sulfide are attracted and adhere to the bubbles. The bubbles are skimmed off the top of the tank, the majority of the water removed and reclaimed, while the recovered product of fine sand and gold sulfide make up the final concentrate. This concentrate is then dried, bagged and loaded into containers to be shipped off the mine site for subsequent smelting elsewhere. All of the crushing, grinding, and flotation occurs inside the mill building which has no discharge to the environment.[3]

Once the gold sulfide is removed, the material that remains is essentially sand, which makes up the majority of the material originally processed through the mill. The sand (now called tailings) is pumped as a slurry (processed water and sand) to the tailings impoundment. At the impoundment, the sand is distributed through a series of pipes to create a relatively even layer across the bottom of the facility. Throughout the life of the mine, the impoundment serves as a treatment facility. Natural runoff from the undisturbed areas above the impoundment is diverted around the facility. This ensures that this water does not intermingle with the tailings water, and that the tailings settle as rapidly as possible. Any water

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[3] For a further description of the milling process, please see Brief for Petitioner Coeur Alaska, Inc. at 5-8 and Forest Service, Kensington Gold Project Final Supplemental Environmental Impact Statement at 2-21 and 2-22 (Dec. 2004) (contained within the Joint Appendix at 159a, 189a-191a).

leaving the impoundment is treated to meet all applicable water quality standards, and then flows through a pipe to enter the stream below the tailings impoundment.

The amount of treated water which can be discharged from the impoundment is prescribed by the United States Environmental Protection Agency regulations. *See* 40 C.F.R. § 440.144. It is equal to the net precipitation minus the evaporation which occurs over the impoundment in a year. This ensures that the "zero discharge" definition in the regulation is achieved.

B. Congress Intended Stationary Discharges to Be Regulated Under Section 404, Not Section 402

The critical characteristic that determines whether a discharge will be subject to Section 404's or Section 402's permit program is whether the materials that are discharged will remain stationary in a navigable water or instead will disperse downstream and elsewhere, resulting in something more than a localized effect. "In contrast to the pollutants normally covered by the permitting requirement of § 1342(a), 'dredged or fill material,' which is typically deposited for the sole purpose of staying put, does not normally wash downstream." *Rapanos*, 547 U.S. at 744-45 (plurality opinion) (citing, in part, 33 U.S.C. § 1344(a)). *See also Kentuckians for the Commonwealth*, 317 F.3d at 446 ("Fill material differs fundamentally from the types of pollutants covered by section 402 because the principal environmental concern is the loss of a portion of the water itself.") Further,

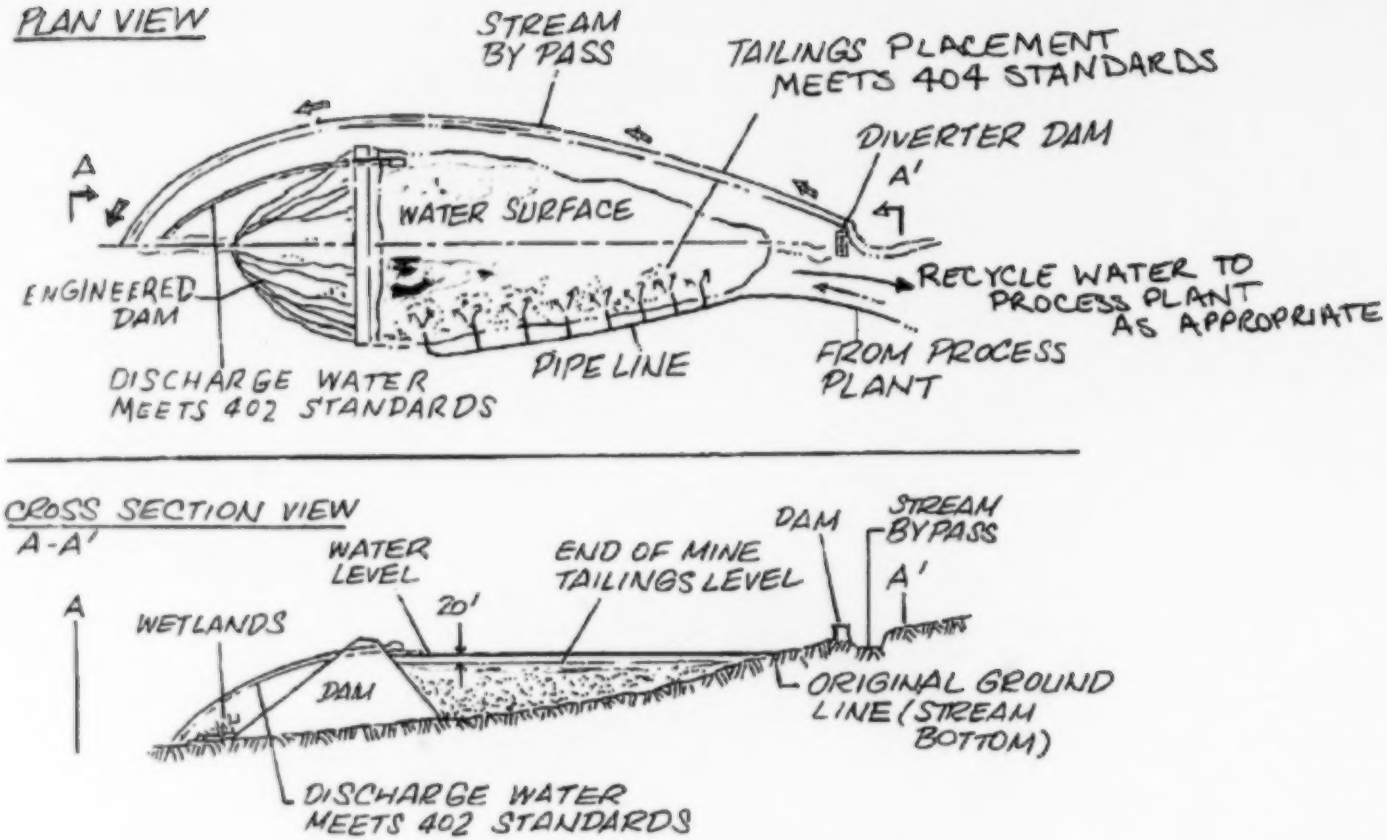
> [I]n many locations throughout the nation, land use controls, a responsibility of state, not federal government, typically have requirements to minimize erosion and sediment runoff during and after construction as well as requiring the control of both quantity and quality of runoff from constructed facilities. Thus, the likelihood that a discharge of fill material will result in the addition of a pollutant to navigable waters located at any appreciable distance from the discharge is highly unlikely.

Pierce at 35.

Even though "[t]he idea that the discharge of dredged or fill material into isolated waters . . . will pollute navigable waters located at any appreciable distance from them lacks credibility," *id.* at 34, to the extent that fill material "could travel downstream through waterways adjacent to a wetland . . . this is a factual possibility that the Corps' experts can . . . assess," *Rapanos*, 547 U.S. at 774 (Kennedy, J., concurring), as the Corps did in this case when it determined that Petitioner Coeur Alaska's discharge would result in the disposal of "fill material." *See SEACC*, 486 F.3d at 640-41.

Permitting the tailings discharges in this case under Section 404 is consistent with the stationary nature of fill material. Tailings are the leftover material from the froth-flotation process that extracts the actual gold from the ore-bearing rock from the mine. The 90-foot high, 500-foot long dam to be constructed by Petitioner Coeur Alaska, *see id.* at 642, evidences an intent to ensure that the tailings "will remain in place in perpetuity." Pierce at 35 ("Citizens

who typically have the need to discharge fill material do so with the intent that the material will remain in place in perpetuity."). Consistent with the definition of fill material, the tailings will not wash downstream, but instead will settle at the bottom of Lower Slate Lake. *See SEACC*, 486 F.3d at 642. The propriety of subjecting this stationary material to only a Section 404 permitting process is further demonstrated by the Corps' issuance of a Section 402 permit for the water that will be displaced and dispersed when the tailings enter the dammed lake, as illustrated by the diagram below.



VALLEY USAGE FOR TAILINGS PLACEMENT

Indeed, while discharges for which a discharger will have little or no control are regulated by Section 402, discharges that remain stationary should be permitted solely under Section 404. Petitioner Coeur Alaska's discharge of tailings in this case requires only a Section 404 permit.

III

THIS COURT'S DECISION WILL HAVE A SIGNIFICANT IMPACT ON THE VIABILITY OF THE MINING INDUSTRY IN ALASKA AND THE WESTERN UNITED STATES

The importance of the mining industry to Alaska cannot be overstated. Historically, mining has been a cornerstone of Alaska's economy, and the mining industry continues to be one of the most important growth segments of Alaska's economy (currently the only segment of Alaska's economy that has reported double-digit growth). The mining industry accounts for approximately 8% of Alaska's overall economy. *See* State of Alaska Petition for Writ of Certiorari at 29-30 (citing United States Dep't of Labor, Bureau of Labor Statistics, *Alaska Economy at a Glance* (2007); United States Dep't of Commerce, Bureau of Economic Analysis, *Gross Domestic Product by State* (2007); D. J. Szumigala & R. A. Hughes, *Alaska's Mineral Industry 2006: A Summary* 1-2 (2007)). According to the most recent study conducted for the AMA, the mining industry contributed nearly $4 billion to Alaska's economy in 2007, including $275 million in exploration, $274 million in development, and $3.4 billion in gross mineral production value. Alaska Miners Association, *The Economic Impacts of Alaska's*

Mining Industry, (2007).[4] The mining industry is also an extremely important source of revenue for state and local governments. In 2007, the mining industry paid $14 million to local government, and $175 million to state government. *Id.*; *see also* McDowell Group, Alaska Miners Association, *The Economic Impacts of Alaska's Mining Industry*, (Feb. 2006).[5] The Alaskan mining industry also provides a major source of revenue for Native Alaskan corporations. In 2007, the mining industry paid $170 million to Native corporations, of which $125 million was earmarked for redistribution among other Alaska Native regional and village corporations. Alaska Miners Association, *The Economic Impacts of Alaska's Mining Industry* (2007).

In 2007, the mining industry provided 5,500 direct and indirect mining jobs in Alaska, contributing $340 million in direct and indirect payroll. *Id.* These are some of the highest paying jobs in Alaska, with an average annual wage of $80,000—90% higher than the state average for all sectors of the economy. *Id.* And, where located, mining operations provide some of the largest private sector employment opportunities. *See id.*

A 2006 study of the mining industry reported that the industry was poised for ongoing growth; however, affirmance of the Ninth Circuit's decision would have a devastating impact on the mining industry and economy of Alaska—not to mention impacts felt throughout the nation. *See* McDowell Group, *The*

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[4] *Available at* www.alaskaminers.org/mcd07sum.pdf (last visited Sept. 19, 2008).

[5] *Available at* www.alaskaminers.org/mcd06rpt.pdf (last visited Sept. 19, 2008).

Economic Impacts of Alaska's Mining Industry, supra, at 1. It is beyond reasonable dispute that mining operations in Alaska will come into contact with wetlands, which comprise nearly 50% of the state. *See* Mark Squillace, *From "Navigable Waters" to "Constitutional Waters": The Future of Federal Wetlands Regulation*, 40 U. Mich. J.L. Reform 799, 809 (2007). And even before the Ninth Circuit's decision, obtaining a permit for the disposal of tailings was considered one of the "greatest obstacle[s]" to developing a mine project in Alaska. *See* Alaska Minerals Commission, *Report of the Alaska Minerals Commission* (2006), at 1.[6]

> The permitting of the disposal of mine tailings into waters of the United States including wetlands is critical to the mining industry in Alaska. Many mine operations can only be built in valley areas through which streams run and wetland are present. In many instances disposing of tailings in a "drystack" on uplands is not practicable.

Id. at 13. Subjecting the tailings process to the Section 402 permitting scheme would make this process even more difficult (if not impossible) by leaving no practicable solution which would permit the discharge of slurry into an impoundment.[7]

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[6] *Available at* www.dced.state.ak.us/oed/minerals/pub/web06.pdf (last visited Sept. 19, 2008).

[7] One of the most significant distinctions between the permitting programs under Sections 404 and 402 is that the Section 404(b)(1) guidelines contain "practicability" provisions. This means that, under Section 404, the Corps has the latitude and flexibility to evaluate and issue Section 404 wetlands permits in a manner that

(continued...)

While mine exploration and development expenditures have steadily increased over the past decade, affirming the vacatur of Petitioner Coeur Alaska's Section 404 permit could have the effect of jeopardizing Alaska's ability to attract investment and growth of the mining industry. *See* McDowell Group, *The Economic Impacts of Alaska's Mining Industry*, *supra*, at 9-13. In addition, if this Court declares the Corps' issuance of the Section 404 permit to Petitioner to be invalid, producing mines that use tailings impoundments will have to cease or delay their operations until they can be brought into compliance with the new regulatory scheme. *See* 33 U.S.C. §§ 1319, 1365. For example, Alaska's Red Dog mine is operating under a Section 404 permit that was issued in 1985 for the placement of lead and zinc mine tailings into an impoundment located in wetlands. Brief for the National Mining Association as Amicus Curiae Supporting Petitions for Rehearing en Banc at 10. *Southeast Alaska Conservation Council v. United States Army Corps of Engineers*, 486 F.3d 638 (9th Cir. 2007) (No. 06-35679).[8] If upheld, the Ninth Circuit's decision could be used to frustrate this essential mining operation. The impact would be devastating, as the Red Dog mine is the world's largest zinc concentrate producer, providing $9 million (of the total $14 million) in payment to local governments, and nearly all of the $170 million in revenue to Native

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[7] (...continued)
is based on cost, technological feasibility, sound science, and the minimization of environmental impact. By contrast, the EPA's Section 402 "zero discharge" performance standard is absolute.

[8] Similarly, the Fort Knox gold mine is operating under a Section 404 permit to discharge tailings into an impoundment located in a wetland. *Id.* at 11.

Alaska corporations. Alaska Miners Association, *The Economic Impacts of Alaska's Mining Industry*, (2007). The potential impact to Alaska's mining industry and its demonstrated ability to bring economic development to diverse, remote areas of Alaska lends question to the Ninth Circuit's overturning of 35 years of agency practice of regulating fill material solely under Section 404.

CONCLUSION

For the reasons stated above, the judgment of the Ninth Circuit should be reversed.

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Respectfully submitted,

JAMES S. BURLING
Counsel of Record
BRANDON M. MIDDLETON
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amici Curiae
Pacific Legal Foundation,
Alaska Miners Association,
and Alaska Forest Association